In Re: Joel J Duclos,

Case No. 04-45045 Chapter 13 Case

Debtor,

### NOTICE OF HEARING AND MOTION FOR RELIEF FROM THE STAY

TO: Debtor(s) and other entities specified in Local Rule 9013-3.

- Nissan Motor Acceptance Corporation as servicing agent for Nissan-Infiniti LT moves the Court for the relief requested below and gives notice of hearing.
- 2. The Court will hold a hearing on this motion on October 28, 2004 at 2:00 PM o'clock, in Courtroom No. 8 West, at the United States Courthouse, 300 South Fourth St, Minneapolis, MN.
- 3. Any response to this motion must be filed and delivered not later than October 25, 2004, which is three days before the time set for the hearing (excluding Saturdays, Sundays, and holidays), or filed and served by mail not later than October 19, 2004, which is seven days before the time set for the hearing (excluding Saturdays, Sundays and holidays). UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.
- 4. This Court has jurisdiction over this motion pursuant to 28 U.S.C. §§157 and 1334, Fed. R. Bankr. P. 5005 and Local Rule 1070-1. This proceeding is a core proceeding. The petition commencing this case was filed on September 9, 2004. The case is now pending in this court.
- 5. This motion arises under 11 U.S.C. §362(d), §365(a) and (d), and Fed. R. Bankr. P. 4001 and 6006. This motion is filed under Fed. R. Bankr. P. 9014 and Local Rules 9006-1, 9013-1 through 9013-3, and 9017-1. Movant seeks relief from the automatic stay of §362(a), to terminate the lease and to repossess the 2002 NISSAN PATHFINDER 4WD VEHICLE leased to Debtor, and requests the court permit Movant to immediately enforce the order requested, without the 10 day

stay imposed by Rule 4001(a)(3).

6. Movant requests relief under §362(d)(2). Debtor has no equity in the vehicle and the vehicle is

not necessary to an effective reorganization. Movant requests relief for cause under §362(d)(1).

Failure to assume the Lease and to provide adequate protection or adequate assurance of future

performance under the Lease constitutes cause.

7. If testimony is necessary as to any facts relevant to this motion, the person who signed the

verification to this motion or some other representative for Movant, from Movant's offices in

Minnesota, will testify regarding the Lease terms and default.

8. This notice of motion and motion also serve as notice of default required by <u>Cobb v. Midwest</u>

Recovery Bureau Co., 295 N.W.2d 232 (Minn.1980). If the default is not cured before the

hearing, Movant will repossess the property promptly upon the Court signing the Order.

9. A separate Memorandum of Fact and Law is attached hereto and made a part hereof.

WHEREFORE, Nissan Motor Acceptance Corporation as servicing agent for Nissan-Infiniti LT

moves the Court for an order modifying the automatic stay of §362(a) and the codebtor stay of

§1301(a), if applicable, and such other relief as may be just and equitable.

Dated: October 1, 2004

STEWART, ZLIMEN & JUNGERS, LTD.

/e/ Linda Jeanne Jungers

Linda Jeanne Jungers, Atty ID #5303X

Attorneys for Movant

430 Oak Grove Street #200

Minneapolis, MN 55403

612-870-4100

This is a communication from a debt collector attempting to collect a debt. Any information obtained will be used for that purpose.

## SATE OF MINNES TA CERTIFICATE OF TITLE FOR A MOTOR VEHICLE

VEHICLE IDENTIFICATION NUMBER YEAR MAKE TITLE NUMBER JNADRO9Y32W726729 05 NIZZ 4 🛭 PF H7590b0P7 TAX BASE CODE PLATE NUMBER CENTRAL OFFICE USE ONLY **ODOMETER** 05/08/02 40 058784 09 **22E2VH** NEW 04/01/02 EXP 03 OWNER INTERESTS SECURITY DOB NISSAN-INFINITI LT BOX PPOSP BAED-44527 XT ZAJJAD ODOMETER DISCLOSURE STATEMENT, I (WE) CERTIFY THAT THE ODOMETER DAMAGE DISCLOSURE STATEMENT. TO THE BEST OF MY KNOWLEDGE THIS VEHICLE (NO TENTHS) MILES AND TO THE ☐ HAS NOT (CHECK ONE) SUSTAINED DAMAGE IN EXCESS OF 70% ACTUAL CASH VALUE. NOW READS POLLUTION SYSTEM DISCLOSURE STATEMENT. TO THE BEST OF MY KNOWLEDGE THE POLLUTION BEST OF MY KNOWLEDGE THE ODOMETER MILEAGE IS: CONTROL SYSTEM ON THIS VEHICLE INCLUDING THE RESTRICTED GASOLINE PIPE ☐ ACTUAL MILEAGE ... ☐ HAS ☐ HAS NOT (CHECK ONE) BEEN REMOVED, ALTERED OR RENDERED INOPERATIVE. ☐ EXCEEDS MECHANICAL LIMITS OF ODOMETER Assignment: I (we) certify that this vehicle is free from all security interests, warrant title, and assign the ☐ NOT ACTUAL MILEAGE — WARNING ODOMETER DISCREPANCY registration tax and vehicle to: 1 SELLER'S PRINTED NAME(S) DATE OF SALE BUYER'S PRINTED NAME(S) SELLER'S ADDRESS DEALER LICENSE # BUYER'S ADDRESS Х BUYER'S SIGNATURE(S) SELLER'S SIGNATURE(S) IMPORTANT — PLEASE READ; All information collected on a motor vehicle application is required by law and is used to identify your motor vehicle. Failure to provide required information may result in denial of the requested action. Except for certain uses your express consent. You may expressly consent to the disclosure of your information by writing to the following address MINNESOTA DEPARTMENT OF PUBLIC SAFETY DRIVER AND VEHICLE SERVICES DIVISION 445 MINNESOTA STREET, ST. PAUL, MINNESOTA 55101 PS2700-11 PHONE 651-297-2126 TTY 651-282-6555 www.dps.state.mn.us/dvs ABERTAGENANY AMBERATION OF BRASIDEWOIDS HE IS THE MINNESOTA MOTOR VEHICLE REGISTRATION CARD SELLER'S NOTICE OF SALE When you sell this vehicle, you are responsible to file the information below with the MK Department of Public Safety within 10 days. You may file over the Internet at 02 NIZZ 4 1 PFI www.dps.state.mn.us/dvs or complete this post card and mail. This notice is not VIN required if sold to a licensed dealer, MN Statute 168A.10 JNADROGYBZW726729 GROSS VEHICLE WEIGHT/BASE VALUE 028189 H7590b0P7 JNADROGY32W726729 Title Number Vehicle Identification Number PLATE # **HVZ355** 03/31/03 Date of Sale STICKER # CD734526 367.00 RECORDED OWNER(S): NISSAN-INFINITI LT Purchaser's Full Name Purchaser's Date of Birth Street Address BOX PPORP DALLAS TX 75266-0368 City Zip Code County

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# **EXHIBIT B**

## Additional Terms and Conditions

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Wednesday, September 29, 2004.max

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Trade-in	BODY TYPE	Model No.	Loan	Retail	Trade-II	, B	ODY YPE	Madei No.	Loan	Retail
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2002 P	ATHFINDER-V6	-4WD	N	AC: II	15825	Van G	LE	N17	14250	18575
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17450	Utility 4D LE (2WD	) R09X	15725	20425	400	Add L	.eather (Std. (	GLE)	400	450
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	Utility 4D LE		17250	22250	1/5	Add P	wr Seat (Std.	GLE)	175	200
225	Add Bose Stereo	(Std. LE)	225		250	AUG H	Rear Air Cond		250	300
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9075	K-Cab Std. (4 Cyl.)	DD26S	8175	11250	14250	1 Hillity 2	ID SE	ED28T	12225	10000
9775	King Cab XE (4 Cy	1.) DD26S	8800	12000	15250	Utility 4	ID SE SC	MD28T	13725	17050
10675	King Cab XE	ED26T	9625	12975	13023	Utility 4	1U XE (499U)	EU28Y	13525	17725
118/5	King Cab SE (AT) .	ED26T	10700	14325	10023	Uthity /	KE SC (4WD)	MD28Y	14425	18775
13175	King Cab SC King Cab XE (4WD	NUZ01	11075	149/5	16050	Utility 4	D SE (4WD)	ED28Y	14375	18700
4375	K-Cab SE (4WD, A	T) FD26Y	12950	17025	225	Add D	SE SC (4WD)	MU281		
14950	King Cab SC (4WI	) MD26Y	13475	17625	223		lockford Fosg SE)		225	250
002 FR	ONTIER CREW	CAB-V6		IC: I	275	Add S	unroof		275	325
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3875	Crew Cab SE LB.	ED29X	12500	16500	125	Deduc	t Wout Pwr	Locks	125	125
14375	Crew Cab SC	MD27T	12950	17025	1/5	Deduc	t Wout Pwr	Wind	175	175
144/5 (	Crew Cab SC LB .	MD29X	13050	17125	123	Deauc	t Wout Tilt		125	125
15050	XE (4WD, 5 Spd.).	ED2/Y	134/5	1/625	NISSAN	l				
6275	XE LB (4WD, 5 Spi Crew Cab SE (4WI	1).ED291	14650	10050	2001 P	ATHFI	NDER-V6-4	IWD	M	C: 11
6375	C-Cab SE LB (4WI	) ED29Y	14750	19150	14175	Utility 4	D XE (2WD)	R07/9X	12775	16800
6875 (	Crew Cab SC (4W)	D) .MD27Y :	15200	19675	14//5	Uthity 4	D SE (2WD)	R07/9X	13300	17450
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131	<b>ldd</b> CD Player. (King Cab Standa	rd/YE\	75	100	150	Add Po	ower Seat		150	175
150 A	ld d Cruise Control	*	150	175	450	Add Pv	Mr Snrf (Std. 1	.E)	450	500
2/5 /	<b>100</b> Leather Seats		275	325	3/5	Add Re	ear Entertainr	nent Svs	375	425
100 A	<b>\dd</b> Power Locks*		100	125	475	AGG II	eft Recovery	System		75
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# **EXHIBIT C**

PAGE 2

04-03987-0

## UNITED STATES BANKRUPTCY COURT DISTRICT OF MINNESOTA

In Re: Joel J Duclos, Debtor, Case No. 04-45045 Chapter 13 Case

## VERIFICATION FOR MOTION FOR RELIEF FROM STAY

I, Jill Jones, the Designated Agent for Nissan Motor Acceptance Corporation as servicing agent for Nissan-Infiniti I.T, the Creditor herein, declare under penalty of perjury that the following is true and correct according to the best of my knowledge, information and belief, and based on the Creditor's business records:

- I am legally competent to testify and am personally familiar with the debt owed by Debtor to the Creditor on account no. 25005346182.
- True and correct copies of the little documents are attached to the Motion as Exhibit "A". True
  and correct copies of the lease documents are attached as Exhibit "B".
- 4. The proposed chapter 13 plan says Debtor will surrender the vehicle; Debtor has failed to do so.
- 5. Creditor had commenced a state court replevin action to repossess the vehicle due to Debtor's failure to make lease payments and refusal to surrender the vehicle. The state court action has been stayed pending this motion.

Dated: 12%

Till Jones

Nissan Motor Acceptance Corporation as servicing agent for Nissan-Infiniti LT

Bankruptcy Dept. PO Box 660366

Dallas, TX 75266-0366

In Re: Joel J Duclos,

Case No. 04-45045 Chapter 13 Case

Debtor,

### MEMORANDUM OF FACT AND LAW

Nissan Motor Acceptance Corporation as servicing agent forNissan-Infiniti LT ("Movant") submits this Memorandum of Fact and Law in support of its motion for relief from the stay.

## **FACTS**

Debtor's Chapter 13 Plan has been filed with the Court. The plan provides for Debtor to surrender the leased vehicle. Debtor is in possession of the vehicle subject to a lease agreement dated 4/01/02, and such agreement is a true lease, and not a retail installment contract, as defined by Minn. Stat. §336.2A - 103(j) and §168.66. Movant is the registered owner of the vehicle as reflected by the Certificate of Title. According to the terms of the lease, Debtor is to make monthly payments of \$516.53 for use of the vehicle. Debtor must also pay for any excess mileage and excess wear and tear at termination of the lease. Debtor has the option to purchase the vehicle at the end of the lease agreement by paying the purchase option price in cash.

Debtor is delinquent on lease payments due since May 28, 2004. The NADA retail value of the vehicle is \$20,975.00. NADA pages for this vehicle value are attached as Exhibit "C".

Movant's interest is subject to depreciation in that the vehicle is being used, subjecting it to wear and depreciation, while Debtor is failing to make payments.

The Plan does not provide for assumption of the Lease and for future payments to Movant in accordance with the Lease, including specifically payment of any excess mileage, excess wear and tear, and early termination charges, as well as the monthly lease payment.

### ARGUMENT

Pursuant to §362(d)(1) of the Bankruptcy Code, relief from the automatic stay shall be granted upon request of a creditor "for cause, including the lack of adequate protection of an interest in property of such creditor." 11 U.S.C. §362(d)(1).

Debtor has failed to make the Lease payments to Movant and has failed to provide adequate protection of Movant's interest in the vehicle or adequate assurance of future performance under the Lease. Such circumstances constitute cause, within the meaning of §362(d)(1), entitling Movant to relief from stay. In re Reinbold v. Dewey County Bank, 942 F.2d 1304, 1306 (8th Cir. 1991).

If there has been a default in an unexpired lease, the Debtor may not assume the lease unless the Debtor provides for a prompt cure of the default and provides adequate assurance of future performance. 11 U.S.C. §365 (b)(1). Failure to do so constitutes cause, within the meaning of §362(d)(1), entitling Movant to relief from the stay. In re Reice, 88 B.R. 676 (Bkrtcy.E.D.Pa. 1988); but see, In re O-Jay Foods, Inc., 110 B.R. 895 (Bkrtcy.D.Minn. 1989). Debtor has failed to propose a prompt cure of the existing default.

11 U.S.C. §363(e) permits the court to condition any use of leased property on providing adequate protection to the lessor and, if such adequate protection is provided, then lessor is excluded for seeking relief from the stay under §362. However, the Debtor has not provided Movant with any adequate protection and the court has not established any prohibition or condition on the continued use of the leased property which would exclude Movant from seeking relief under § 362.

Assumption or rejection of an unexpired lease of personal property is subject to court approval and may be done at any time before confirmation of the plan. §365(a) and (d). The plan does not provide for the assumption of the Lease nor for future payments to Movant pursuant to the Lease.

If a lessor is economically disadvantaged by a Debtor retaining leased property without making payments, the lessor can move for relief from the automatic stay under §362(d). <u>In re Intran Corp.</u>, 62 B.R. 435, 436 (Bkrtcy. D.Minn. 1986). Adequate protection is the "safeguard" to protect a lessor and

moving for relief from the automatic stay or seeking adequate protection is the proper method by which a

lessor may force the debtor to either surrender the leased property or make payments equal to the lessor's

interest in the property. Id. at 436.

Pursuant to §362(d)(2) of the Bankruptcy Code, relief from the stay is also appropriate where

Debtor has no equity in the vehicle and the vehicle is not necessary to an effective reorganization. 11

U.S.C. §362(d)(2). See, In re Gellert, 55 B.R. 970 (Bkrtcy.D.N.H. 1983). Debtor is merely the lessee of

the vehicle and has no ownership interest in it. Debtor has no equity in the vehicle. No evidentiary

hearing is required on the issue of equity unless the debtor disputes it. Powers v. American Honda

Finance Corp., 216 B.R. 95, 97 (N.D.N.Y. 1997).

Bankruptcy Rule 4001(a)(3) imposes a stay of 10 days which the court may, in its discretion,

order is not applicable so that Movant may immediately enforce and implement the order granting relief.

Advisory Committee Notes to 1999 Amendments to Bankruptcy Rule 4001.

Dated: October 1, 2004

STEWART, ZLIMEN & JUNGERS, LTD.

/e/ Linda Jeanne Jungers

Linda Jeanne Jungers, Atty ID #5303X Attorneys for Movant 430 Oak Grove Street #200 Minneapolis, MN 55403

612-870-4100

In Re: Joel J Duclos,

Case No. 04-45045 Chapter 13 Case

Debtor,

## UNSWORN CERTIFICATE OF SERVICE

I, Linda Jeanne Jungers, declare under penalty of perjury that on <u>October 4, 2004</u>, I mailed copies of the attached Notice of Hearing and Motion for Relief from the Stay with Exhibits, Verification,

Memorandum of Fact and Law, Certificate of Service, and proposed Order, by first class mail postage prepaid to each entity named below at the address stated below for each entity.

Joel J Duclos 3958 Adair Ave N Robbinsdale, MN 55422

Barbara J May, Esq. 4105 N Lexington Ave, #310 Arden Hills, MN 55126

Jasmine Z. Keller Chapter 13 Trustee 12 S. 6th St #310 Minneapolis, MN 55402

U.S. Trustee 1015 U.S. Courthouse 300 South 4th Street Minneapolis, MN 55415

Executed on: October 4, 2004

Signed: /e/Linda Jeanne Jungers Linda Jeanne Jungers STEWART, ZLIMEN & JUNGERS 430 Oak Grove Street, #200 Minneapolis, MN 55403

In Re: Joel J D	Ouclos, Debtor, Case No. 04-45045 Chapter 13 Case
	ORDER FOR RELIEF FROM THE STAY
	Motor Acceptance Corporation as servicing agent for Nissan-Infiniti LT's Motion for an order g relief from the stay came before the Court on October 28, 2004 at 2:00 PM o'clock.
in the p	on the arguments of counsel, all the files, records and proceedings herein, the court being advised remises, and the court's findings of fact and conclusions of law, if any, having been stated orally d in open court following the close of evidence,
	IT IS HEREBY ORDERED:
1.	The automatic stay is modified to permit Nissan Motor Acceptance Corporation as servicing
	agent for Nissan-Infiniti LT to terminate the Lease, and to repossess and sell the
	2002 NISSAN PATHFINDER 4WD VEHICLE, VIN JN8DR09Y32W726729
	in accordance with applicable state law.
2.	Notwithstanding Federal Rule of Bankruptcy Procedure 4001(a)(3), this Order is effective
	immediately.
Dated:	
	United States Bankruptcy Judge